Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N–02–641 OF 1997
ARIFIN ZAKARIA, MOHD GHAZALI AND NIK HASHIM JJCA
16 AUGUST 2004

Civil Procedure — Consent order — Variation — High Court judge varied consent order — Whether judge functus officio – Whether judge could vary consent order — Whether judge erred in law and fact in varying consent order

Civil Procedure — Consent order — Variation — Respondent's representative in court throughout negotiations for settlement — Draft judgment explained by solicitor — Whether respondent under misapprehension or confusion as to terms in consent order — Whether parties bound by consent order — Rules of the High Court 1980 O 20 r 11

The appellant sued the respondent for the payment of the sum of RM445,350 for works done by the appellant. When the case came up for continued hearing, it was stood down for settlement by the parties. Assisted by their respective solicitors, the terms of settlement were arrived at between the parties. Consequently the learned judge in the presence of the parties recorded the settlement ('the consent judgment'). Pursuant to the consent judgment, the respondent was ordered to, inter alia, pay the sum of RM445,350 to the appellant. The respondent was also ordered to pay interest at the rate of 8%pa from the date of filing the action until the date of judgment. Subsequently, the respondent filed an application to set aside the consent judgment. In dismissing the respondent's application, the High Court judge varied the terms of the consent judgment such that interest at the rate of 8%pa was to be calculated from the date of the judgment until the date of full settlement and not from the date of filing of the action until the date of judgment as was provided for in the consent judgment. The High Court judge explained that he had varied the consent judgment because the said consent judgment was completely in favour of the appellant and there was reason for the respondent to agree to the terms therein. The judge further stated that the interest amount was not claimed in the statement of claim.

The appellant appealed against the decision of High Court judge in varying the consent judgment.

Held, allowing the appeal:

(1) The respondent was not under any misapprehension or confusion as to any of the terms agreed upon which were embodied in the consent judgment. The respondent, represented by its director, was present in court throughout the negotiations for settlement and the draft judgment was explained to her by her solicitor and she admitted its

correctness. Furthermore, the said director was present in the judge's chambers whereupon the learned judge ascertained with the respondent on the terms that were agreed upon with the plaintiff. To hold that the respondent's director misunderstood the terms of the settlement would be against the weight of the evidence adduced by the parties through their affidavits. As such, the learned High Court judge had erred in law and in fact in varying the terms of the consent judgment on an application by the respondent to set aside the entire consent judgment (see paras 10–11).

(2) The consent judgment had been drawn up and perfected. It was recorded in the presence of the parties in the course of the trial. In the circumstances, the learned judge having rightly dismissed the respondent's application to set aside the consent judgment, was functus officio. Therefore, he could not alter, vary or set aside the consent judgment as he had no jurisdiction under the application to do so, except under the slip rule as set out in O 20 r 11 of the Rules of the High Court 1980 (see para 12).

(3) An order by consent was evidence of a contract between the parties and was binding on all the parties to the order. Therefore, the appellant and the respondent were bound by the consent judgment (see para 13).

[**Bahasa Malaysia summary**

Perayu telah menyaman responden untuk bayaran jumlah RM445,350 untuk kerja-kerja yang telah dilakukan oleh perayu. Apabila kes itu dibawa untuk meneruskan pendengaran, ia telah ditangguhkan untuk penyelesaian di antara parti-parti. Dengan bantuan peguamcara-peguamcara mereka, parti-parti telah sampai kepada terma-terma penyelesaian. Kemudiannya, hakim yang arif telah merekodkan terma-terma itu di dalam kehadiran parti-parti ('penghakiman persetujuan'). Menurut penghakiman persetujuan itu, responden telah diperintahkan, di antara lain, untuk membayar kepada perayu jumlah RM445,350. Responden juga diperintahkan membayar faedah pada kadar 8% setahun daripada tarikh memfailkan tindakan itu sehingga ke tarikh penghakiman. Kemudiannya, responden telah memfailkan permohonan untuk mengenepikan penghakiman persetujuan. Di dalam menolak permohonan responden hakim Mahkamah Tinggi telah mengubah terma-terma penghakiman persetujuan itu menjadikan faedah pada kadar 8% setahun dihitung daripada tarikh penghakiman ke tarikh penyelesaian dan bukan daripada tarikh pemfailan tindakan itu ke tarikh penghakiman seperti yang diperuntukkan di dalam penghakiman persetujuan. Hakim Mahkamah Tinggi mengatakan bahawa beliau telah mengubah penghakiman persetujuan itu kerana penghakiman persetujuan itu memihak kepada perayu dan terdapat sebab-sebab untuk responden bersetuju dengan terma-terma itu. Hakim juga berkata bahawa jumlah faedah tidak dituntut di dalam penyataan tuntutan.

Perayu telah merayu terhadap keputusan hakim Mahkamah Tinggi di dalam mengubah penghakiman persetujuan itu.

Diputuskan, membenarkan rayuan itu:

(1) Responden tidak silap faham atau keliru akan terma-terma yang telah dipersetujui yang terkandung di dalam penghakiman persetujuan itu. Responden, diwakili oleh pengarahnya, telah hadir di mahkamah sepanjang perundingan untuk penyelesaian dan penghakiman deraf telah diterangkan kepada beliau oleh peguamcara beliau dan beliau mengakui kebetulannya. Lagipun, pengarah yang dikatakan itu telah hadir di dalam kamar hakim di mana hakim telah memastikan dengan responden terma-terma yang dipersetujui dengan plaintiff. Untuk memutuskan bahawa pengarah responden salah faham terma-terma penyelesaian itu akan melanggar kepentingan keterangan yang dikemukakan oleh parti-parti melalui afidavit-afidavit mereka. Oleh itu, hakim Mahkamah Tinggi yang arif telah khilaf di sisi undang-undang dan fakta di dalam mengubah terma-terma penghakiman persetujuan pada permohonan responden untuk mengenepikan penghakiman persetujuan (lihat perenggan 10–11).

(2) Penghakiman persetujuan telah disediakan dan disempurnakan. Ia telah direkodkan di dalam kehadiran parti-parti di dalam perbicaraan itu. Di dalam keadaan ini, hakim yang arif setelah menolak permohonan responden untuk mengenepikan penghakiman persetujuan itu dengan betul, adalah functus officio. Oleh itu, beliau tidak dapat menukar, mengubah atau mengenepikan penghakiman persetujuan memandangkan bahawa beliau tidak mempunyai bidang kuasa di bawah permohonan itu untuk berbuat demikian, kecuali di bawah kaedah kesilapan seperti yang diperuntukkan di dalam A 20 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 12).

(3) Satu perintah persetujuan adalah bukti satu kontrak di antara parti-parti dan mengikat parti-parti kepada perintah itu. Oleh itu, perayu dan responden terikat oleh penghakiman persetujuan itu (lihat perenggan 13).]

Notes

For cases on variation of consent orders, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1415–1418.

Cases referred to

Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145 (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 11

Raftfizi bin Zainal Abidin (Aris Rizal Christopher Fernando & Co) for the appellant.
K Anandaraj (Paul Selladurai with him) (Mohamad Jefri, Anandaraj, Paul & Associates) for the respondents.

Nik Hashim JCA (delivering judgment of the court):

BACKGROUND

[1] This appeal is against the decision of learned judge of the Seremban High Court given on 29 September 1997 in varying the 20 September 1996 consent judgment on the respondent's application to set aside the same.

[2] The appellant's/plaintiff's case against the respondent/defendant is for payment in the sum of RM445,350 for works done by the appellant pursuant to a sub-contract between the appellant and the respondent.

[3] On 18 September 1996 to 19 September 1996, the hearing of this case proceeded before the learned judge with the plaintiff calling three witnesses and the defendant calling one witness to testify. When the case came up for continued hearing on 20 September 1996, it was stood down for settlement by the parties. Assisted by their respective solicitors, the terms of settlement were arrived at between the parties. Consequently the learned judge in the presence of the parties recorded the settlement as follows:

DALAM MAHKAMAH TINGGI MALAYA DI SEREMBAN

DALAM NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA

Guaman No 22-66-1991

Antara

Gai Hin Refrigeration Sdn Bhd — Plaintif

Dan

Kamanis Holdings Sdn Bhd — Defendan

Di hadapan Yang Arif
Dato' Mohd Noor Bin Hj Abdullah
Hakim Mahkamah Tinggi
Seremban

Pada 20hb September 1996 — Dalam Mahkamah Terbuka

PERINTAH

GUAMAN INI dipanggil untuk perbicaraan pada 18hb, 19hb dan 20hb September, 1996 dengan kehadiran Encik Christopher Fernando dan Encik Haresh Mahadevan peguam-peguam bagi pihak Plaintif dan Encik Murugappan peguam bagi pihak Defendan dan SETELAH KEBENARAN MAHKAMAH diperolehi untuk memasukkan penghakiman persetujuan terhadap Defendan.

DENGAN PERSETUJUAN KINI DIHAKIMI bahawa Defendan membayar kepada Plaintif sejumlah RM445,350 (Ringgit Malaysia Empat Ratus Empat Puluh Lima Ribu dan Tiga Ratus Lima Puluh Sahaja) yang disimpan di dalam Hongkong Bank akaun No 351-294541-145 termasuk faedah kepada Plaintif;

DAN JUGA DIPERINTAHKAN bahawa faedah yang diperolehi melalui jumlah di atas melalui Hongkong Bank dibayar kepada Lembaga Kemajuan Ikan Malaysia untuk kerja-kerja liabiliti kekurangan berjumlah RM15,986.98 (Ringgit Malaysia Lima Belas Ribu Sembilan Ratus Lapan Puluh Enam Dan Sembilan Puluh Lapan Sahaja).

DAN JUGA DIPERINTAHKAN bahawa faedah sebanyak 8% setahun dibayar dari tarikh pemfailan hingga tarikh penghakiman dan Defendan dikehendaki mendepositkan dalam masa satu bulan dari tarikh perintah ini surat ikatan hakmilik harta benda bersamaan jumlah RM220,000 dengan Mahkamah Yang Mulia ini sebagai sekuriti untuk pembayaran faedah dan juga ianya didaftarkan dengan Pejabat Pendaftar Tanah.

DAN JUGA DIPERINTAHKAN bahawa faedah 8% setahun dikenakan ke atas pembayaran faedah di atas dari tarikh penghakiman ke tarikh jumlah ini dijelaskan.

DAN AKHIRNYA DIPERINTAHKAN bahawa Defendan membayar kos yang dipersetujui sebanyak RM25,000 (Ringgit Malaysia Dua Puluh Lima Ribu Sahaja) kepada peguam Plaintif dalam masa satu bulan dari tarikh perintah ini.

Bertarikh pada 20 haribulan September 1996.

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TIMBALAN PENDAFTAR
MAHKAMAH TINGGI
SEREMBAN

Perintah ini difailkan oleh Tetuan Aris Rizal Christopher Fernando & Co, peguam bagi pihak Plaintif yang beralamat di No 49, Tingkat Satu, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan Darul Khusus (HM/405).

[4] On 7 October 1996, the respondent filed a summons in chambers at encl 133 to set aside the above said judgment.

[5] On 29 September 1997, the learned judge, in dismissing the respondent's application with costs, varied and disallowed the interest in the 20 September 1996 consent judgment in the following terms:

Pada 29hb September 1997 Dalam Kamar

PERINTAH

SAMAN DALAM KAMAR lampiran 133 dipanggil untuk pendengaran pada 29hb September, 1997 dengan kehadiran En. Selladurai, peguam bagi pihak Defendan dan En Haresh Mahadevan, peguam bagi pihak Plaintif dan setelah membaca Saman Dalam Kamar, Afidavit Kalthom bte Jaffar yang diikrarkan pada 7hb Oktober 1996, Afidavit Fong Weng Wah yang diikrarkan pada 5hb Disember 1996, Afidavit Muhammad bin Hj Awang yang diikrarkan pada 27hb Mac 1997 dan Afidavit Fong Weng Wah yang diikrarkan pada 9hb Mac 1997 serta penghujahan-penghujahan dari kedua-dua pihak MAKA ADALAH DIPERINTAHKAN bahawa permohonan ini ditolak dan DIPERINTAHKAN BAHAWA Perintah yang bertarikh 20hb September, 1996 dipinda dengan hanya setakat *mengenepikan persetujuan mengenai faedah sebanyak 8% setahun dari tarikh pemfailan hingga ke tarikh penghakiman* DAN JUGA DIPERINTAHKAN BAHAWA Defendan dikenakan faedah 8% dari tarikh penghakiman sehingga tarikh penjelasan penuh DAN AKHIRNYA DIPERINTAHKAN BAHAWA Iain-lain terma yang dipersetujui di dalam perintah bertarikh 20hb September 1996 melainkan yang dipinda, dikekalkan. Bertarikh pada 29hb September 1997.

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TIMBALAN PENDAFTAR
MAHKAMAH TINGGI
SEREMBAN

JUDGE'S DECISION

[6] In his judgment, the learned judge at pp 42-43 of the appeal record explained the reasons why he varied the consent judgment:

Mahkamah mendapati penghakiman itu memihak sepenuhnya kepada Plaintif dan Defendan tiada sebab untuk menyetujuinya kerana ia tiada mendatangkan sebarang benefit kepada Defendan. Mahkamah juga mendapati faedah tertentu sebanyak RM15,986.98 tidak dituntut dalam penyata tuntutan dan bagaimana pula Defendan harus menyetujuinya. Begitu juga dengan persetujuan supaya Defendan membekalkan sekuriti berjumlah RM220,000. Ini tidak timbul langsung. Oleh yang demikian Mahkamah mendapati Defendan mungkin tidak faham kesan dan akibat penghakiman yang kononnya dipersetujui itu. Mahkamah tidak menerang atau menjelaskan terma penghakiman itu tetapi Mahkamah ada memastikan sama ada Defendan mencapai persetujuan dengan Plaintif. Persetujuan tentang dua perkara yang tersebut di atas diragui dan diketepikan.

Selanjutnya Defendan mempertikaikan ada bersetuju membayar faedah dan kos. Selain dari tohmahan Defendan terhadap bekas peguamnya tiada terdapat sebarang keterangan. Disebaliknya pula tidak terdapat penafian dari bekas peguamnya. Tetapi Plaintif ada menerangkan perbincangan yang membawa kepada persetujuan itu. Pada pendapat saya sesuatu penghakiman yang dipersetujui

tidak wajar diketepikan dengan tohmahan semata-mata seperti dalam kes ini, kerana jika diterima, sesuatu penghakiman itu tidak akan muktamad dan mudah dipertikaikan.

Oleh kerana itu saya kekalkan penghakiman tentang pembayaran RM445,350 berserta faedah dan kos.

CONTENTIONS OF PARTIES

[7] Learned counsel for the appellant submitted that the learned judge had misdirected himself when having correctly dismissed the said summons in chambers varied the consent judgment as he was functus officio and had no jurisdiction under the application to vary or set aside the same consent judgment.

[8] Learned counsel for the respondent on the other hand argued that the learned judge had the discretion to amend the consent judgment before it was perfected.

[9] It is to be noted that in the course of the respondent's submission, the respondent withdrew its cross appeal and we ordered it to be struck out with costs.

DECISION

[10] We agree with the appellant. The respondent was not under any misapprehension or confusion as to any of the terms agreed upon which were embodied in the consent judgment. The respondent, represented by its director Pn Khaltom bte Jaffar, was present on 20 September 1996 throughout the negotiations for settlement and the draft judgment was explained to her by her solicitor and she admitted its correctness. Furthermore, she was present in the learned judge's chambers whereupon the learned judge ascertained with the respondent on the terms that were agreed upon with the plaintiff. Puan Khaltom was not misled. To hold that she misunderstood the terms of the settlement would be against the weight of the evidence adduced by the parties through their affidavits.

[11] Thus, we hold that the learned judge erred in law and in fact in varying the terms of the consent judgment on an application to set aside the whole of the consent judgment on the ground that the terms of the said consent judgment were not to the benefit of the respondent when in actual fact the appellant was entitled to be paid the judgment sum and also entitled to interest as it was prayed for in the statement of claim.

[12] In the present case, the consent judgment dated 20 September 1996 had been drawn up and perfected. It was recorded in the presence of the parties in the course of the trial. In the circumstances, the learned judge having rightly dismissed the respondent's summons in chambers, was functus

officio, and therefore he could not alter, vary or set aside the judgment as he had no jurisdiction under the application to do so, except under the slip rule as set out in O 20 r 11 of the Rules of the High Court 1980 ('the RHC'). The Federal Court in the case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 ruled:

Held:

[1] the learned judge was functus officio;

[2] the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it had been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

[13] It is to be noted that an order by consent is evidence of a contract between the parties and is binding on all the parties to the order (see *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (FC)) Therefore, the appellant and the respondent in this case are bound by the 20 September 1996 consent judgment.

[14] Accordingly, we allowed the appeal with costs and set aside the order of the learned judge dated 29 September 1997. We ordered that the consent judgment recorded on 20 September 1996 be restored. The deposit paid into court was ordered to be refunded to the appellant.

Appeal allowed.

Reported by Lim Lee Na